Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

THE HENDRY CORPORATION, and GULF MARINE REPAIR CORPORATION,

Petitioners,

v.

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court correct the course of the Eleventh Circuit, whose recent cases have unduly expanded and liberalized the scope of the "state action" doctrine (by indulging presumptions, inferences and suppositions), thus exempting from the strictures of the antitrust laws almost any collusive action which is linked in any conceivable way to state authorization?

   a. Does a State "clearly articulate" a policy to *displace* competition with regulation when, to the contrary, its statutory scheme provides, in part, that "(1) The Purposes of this part are . . . (b) To *encourage* independent action by, and reasonable price competition among, insurers. . . . "?

      (The answer to this question requires the resolution of a conflict between the Eleventh and Ninth Circuits.)

   b. Does a State immunize from antitrust liability, under the "state action" doctrine, the actions of insurance carriers in *unsupervised* areas of conduct by providing limited approval of rate-making activities?

      (The answer to this question requires the resolution of a conflict between the Eleventh Circuit, on the one hand, and the First and Ninth Circuits, on the other.)

   c. Does a State immunize from antitrust liability, under the "state action" doctrine, the rate-making activities of insurance carriers by merely modifying the agreements as to rates which resulted from unsupervised collusive conduct?

QUESTIONS PRESENTED FOR REVIEW – Continued

(The answer to this question requires an interpretation and application of this Court's decision in *FTC v. Ticor Title Ins. Co.*, ___ U.S. ___, 112 S.Ct. 2169 (1992).)

2. Does the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§901, et seq., and the regulations promulgated pursuant to the Act, preempt state regulation of the subjects covered by the Act?

(The answer to this question requires a determination of the scope of preemption and of the continuing vitality of *Southern P. Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438 (1920), and *Washington v. Dawson & Co.*, 264 U.S. 219, 228, 44 S.Ct. 302 (1924) and a resolution of a conflict between the Eleventh and Fifth Circuits.)

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners:	Gulf Marine Repair Corporation
	The Hendry Corporation
Respondent:	National Council on Compensation Insurance

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The Court of Appeals' summary affirmance is not reported and is reproduced at page App. 1 of the Appendix. The opinion of the district court, granting the Respondent's motion for summary judgment and denying the Petitioners' motion for partial summary judgment, has not been reported and is reproduced in the Appendix beginning at page App. 23. The Report and Recommendation of the Magistrate Judge has not been reported and is reproduced in the Appendix beginning at page App. 2.

JURISDICTION OF THIS COURT

The Court of Appeals' decision in this matter was rendered on January 10, 1995, and this petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

20 C.F.R. §703 is reproduced in the Appendix, beginning at page App. 31.
Fla. St. 627.031, 627.311, and 627.314 are reproduced in the Appendix, beginning at page App. 55.

STATEMENT OF THE CASE

Statement of the facts

These antitrust claims were brought by two affiliated Tampa companies – Gulf Marine Repair Corporation (a shipyard) and The Hendry Corporation (a dredging company) – against Liberty Mutual Insurance Company and the Respondent, the National Council on Compensation Insurance ("NCCI"). It was alleged that various activities of the Respondent and Liberty Mutual taken in connection with providing coverage under the Florida Workers' Compensation Act and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §901, et seq., violated the antitrust laws of the United States and the State of Florida.

The Petitioners alleged that there were at least five different agreements violative of the antitrust laws: (1) an agreement among carriers as to which employers will not have coverage written in the "voluntary market" and who will, therefor, be designated "assigned risks" and relegated to the Assigned Risk Rating Program ("ARRP"); (2) an agreement as to the factors to be considered in and methods for determining the premium to be charged an entity assigned to the ARRP; (3) an agreement as to the premium to be charged to employers assigned to the ARRP; (4) an agreement as to the terms and conditions of sale of coverage; and (5) an agreement to boycott, intimidate, or coerce employers, the State, and other carriers into acquiescing in and accepting the Respondent's unlawful activity and the results of the Respondent's agreements.

Because Petitioners had been denied workers' compensation insurance coverage in the "voluntary market" (pursuant to the unlawful agreements of the carriers), it paid not only nearly $2 million in premiums for 3 years' coverage based on State-approved rates, but was facing a claim by Liberty Mutual for over $1.4 million in additional premiums.[1] It was these additional premium charges that Petitioners claimed were their antitrust damages.

The Respondent asserted that all the challenged conduct was exempt from the application of the antitrust laws by virtue of the "state action" doctrine. Petitioners asserted that the doctrine is not applicable to most of the claims in this case (1) because state regulation of LHWCA coverage is preempted by federal law; and (2) because, even if there is no preemption, the exemption is unavailable, since there was neither (a) a sufficiently "clearly articulated" state policy to displace competition nor (b) was there sufficient "active state supervision" of the collusive behavior to permit application of the "state action" doctrine.

Discovery was limited by court order to the facts which might support or refute the "state action" defense. That discovery revealed (among other things) that Florida did not supervise the collusive conduct of carriers as they determined whether to write coverage for an employer-applicant in the "voluntary market"[2] or to relegate that

---

[1] At trial on its claim for additional premiums, Liberty Mutual was awarded $350,000. That judgment was not appealed by either side.

[2] It is clear that the Respondent's collusive machinations concerning the assigned risk program (the "residual market") are not supervised:

employer to the "residual market" (sometimes referred to as "the Assigned Risk Plan" or the "Florida Workers'

Q [*by Mr. Braman, NCCI's counsel*]: Is the mechanism by which NCCI assigns risks to a particular servicing carrier a mechanism that has been approved by the State of Florida and your Department?

A: To my knowledge we have not approved the specific assignment process. I basically understand what they do, but we have not approved their specific assignment process.

Watford depo., pp.25-26.

Q [*by Mr. Schlanger*]: Does the Department involve itself in the decision by carriers whether to accept or decline to write insurance in the voluntary market?

A: Only to the extent that they are expected to follow statutes.

Q: What statutes?

A: Well, there is unfair and discriminatory statutes . . . a specific statute that says they are not supposed to discriminate by size. . . . But we don't go in the companies and participate in their decision-making on an individual case-by-case basis, no.

Watford depo., pp.82-83.

Q [*by Mr. Braman*]: Now, does a servicing carrier under the Florida Workers' Compensation Insurance Plan have the ability to file or seek approval of a deviation of the rates to be charged under the Florida Workers' Compensation Insurance Plan?

A: That would be an interesting concept. I guess legally they have the right to do that, but none of them ever have, and I would think that they would be violating their servicing agreement.

Watford depo., p.30.

Q [*by Mr. Schlanger*]: Mr. Watford, you talked earlier about the servicing agreements of the carriers

Compensation Insurance Plan"). That decision by the carriers determined whether a particular employer would become an "assigned risk", thus freeing the carriers from the limitations imposed by the State-approved rates.

Discovery also revealed that carriers in Florida apparently cause employers to be designated "assigned risks" *not* for the reasons usually thought to require or invite such a designation (*i.e.*, because the employers "have a demonstrated accident frequency problem, have a measurably adverse loss ratio over a period of years, or . . . have demonstrated an attitude of non-compliance with safety requirements", Fla.Stat. §627.311(4)(a)). Rather, the carriers place employers in the Assigned Risk Plan ("the residual market") because the carriers are unhappy with (and want to avoid) the State-approved rate structure in the "voluntary market", and seek to bring pressure to bear on state regulators to increase rates (while earning a better return by writing coverage in the "residual market"). As NCCI's representative stated (and impliedly threatened, in seeking a rate increase):

> "This just shows the growth in the assigned risk plan over the last six years . . . as the losses have mounted and as the results have gotten worse. . . .
>
> " . . . I don't believe it's true that insurors have remained in the market in the same way they would were rates on a prospective basis adequate but it is also true that insurors have not

---

with NCCI and with each other, do you recall that?

A: I remember some reference to servicing agreements.

Q: The Department of Insurance doesn't supervise those agreements, does it?

A: No.

Watford depo., pp.118-119.

abandoned the market completely as they have in some other states.

"[In] Maine you've certainly had a severe abandonment in the market, 80 percent of the premium – more than 80 percent of the premium is in the assigned risk pool. In Louisiana you've had a similar type of situation, albeit not quite as extreme but with the same sort of intransigence on rate changes you get that same kind of market dislocation. In Rhode Island you've had similar results.

. . . .

"Maine had a period of time, five or six years, when no rate changes were permitted at all. Costs were escalating at extremely rapid rates and because of peculiarities of their rating law there were no rate increases whatsoever. And that's what led to the market abandonment in Maine and I would not expect that to take place in a jurisdiction which has seen fit to address the concerns of rate inadequacy.

"[T]he growth in the size of the residual market is a reflection of the economic reality that insurors cannot continue to operate in an environment where they are turning over substantial shares of their equity to fund the system."

Testimony of Dr. David Appel, Economist for NCCI, Rate hearing of October 23, 1989, Exhibit NX 5, Pages N010850-53.

The agreement by carriers to "abandon the market", thereby causing employers to be designated "assigned risks", is *not* supervised by the State but is accomplished and administered collectively and collusively. *See, e.g.*, Watford depo., pp.25-26; Exhibit NX 19, the "Handbook", entitled "Florida Workers Compensation Insurance Plan" and published by NCCI, p.I-1.

At least insofar as shipyards are concerned, the scheme has been successful. There is no Florida shipyard whose standard premium would exceed $50,000 which has coverage written in the voluntary market by an insurance company.

Moreover, even with regard to the rate-making process (where limited joint action is permitted by statute), it was uncontroverted that the State of Florida did *not* participate in or supervise the collusive actions of the insurers but, rather, the State simply reviewed and modified the *results* of that collusive action, that the carriers failed to provide Florida with data it requested in the rate-making process (to determine whether the numbers being used are correct), and that much of the data that the carriers did submit (through NCCI) was inaccurate:

> "Well, we don't always get a chance to talk to the carriers. We get you guys [NCCI] and, you know, you sort of block us off from the true sources."
>
> Statement of Tom Gallagher, Treasurer and Commissioner of Insurance of the State of Florida, Hearing of October 23, 1989, Exhibit NX 4, page N010718.

> "Let me just take an opportunity, if I may, to tell you that as a legislator for 13 years and being on the Commerce Committee that handled Workers' Compensation, we had continual concern and problem about the data that backed the filings that caused these increases. . . . [T]he truth of the matter is what needed to be done was a full audit at the National Council and the insurance industry to see exactly how the data was collected, where that data came from and the value of that data. . . . "

Statement of Tom Gallagher, Hearing of October 30, 1991, Exhibit NX 3, pages N010594-95.

"They [the insurance industry] won't ever acknowledge exactly what the numbers are for investment income and exactly when they're making money and when they're not making money."

Statement of James D. Watford, Actuary, Department of Insurance of the State of Florida, Hearing of October 23, 1989, Exhibit NX 5, pages N010862-63.

Q: . . . Have you ever been frustrated in trying to get data from NCCI?

A: Yes.

Q: And, in fact, NCCI has consistently failed to provide some data that you have asked for, haven't they?

A: There have been times that they failed to provide data.

Q: Do you recall in 1988 at the hearing on a filing that was made to be effective January of '89 saying that the filing is void of any comprehensive analysis of investment income or how it's considered in the filing?

A: Yes, I believe I do.

Watford depo., p.126.

"I must observe that once again the filing is void of any comprehensive analysis of investment income or how it is considered in the filing. . . . [T]here is no explanation of how investment income is considered or what the appropriate relationship should be."

Statement of James D. Watford, Hearing of November 4, 1988, Exhibit NX 6, pages N011030-31.

Q: What's a unit statistical card?

A: It's the report that a carrier sends to NCCI six months after the policy expires. That report details payrolls, classifications, claims, quite a bit of detail. It's really the basic data that goes into the classification ratemaking.

Q: It's important stuff?

A: Yes.

Watford depo., pp.126-127.

"[O]ur examiners are not finding much improvement in the way that the companies are filling out their statistical cards. We are still finding the same amount of errors that we found four years ago, and we are concerned about it and we think there is still room for great improvement here. . . . "

Statement of James D. Watford, Hearing of November 4, 1988, Exhibit NX 7, page N011243.

"Since last year, . . . we have done examinations in 92 companies . . . or groups, and the error ratio that we're seeing over the unit statistical cards is higher than it was last year, equal to about what it was two years ago.

"And that error ratio is about 31 percent. In other words, 31 percent of the cards that we examined had an error in them."

Statement of James D. Watford, Hearing of October 23, 1989, Exhibit NX 5, page N010872.

"It's very difficult for us to understand how the National Council determines what's the appropriate expenses in a filing. We've been asking questions – I personally have been asking questions for five years, and I still don't know the answers."

Statement of James D. Watford, Hearing of November 4, 1988, Exhibit NX 6, page N011050.

Q: What does the NCCI classification rating committee do that your Department does not do with respect to rates and classifications?

. . . .

A: . . . It was a committee of NCCI that, a group of companies with their member companies who got together and determined what they would authorize the filings to be. So, I mean, they are nothing like what we do. I mean, they are the industry getting together to decide what to file. We are approving or disapproving, whatever.

Q: But are you familiar with the way the committee operated?

A: Yes.

Q: In arriving at the numbers that they then submit to your Department for rates, and the factors that are to be used, what data did the committee review that your Department did not review?

A: I have no idea what they reviewed that we didn't review.

Watford depo., p.103.

Proceedings below

Petitioners moved for a preliminary determination of a legal issue – the preemptive effect of the LHWCA, R.1-21. The Respondent moved for summary judgment as to the antitrust claims based on the "state action" doctrine, R.1-35 and R.1-37. Discovery was limited to the issue of the "state action" immunity defense.

The district court referred both motions to a Magistrate Judge, R.2-49, who found in favor of Respondent, R.2-60. The district court then affirmed the Magistrate's determinations, R.3-72. Judgment was then entered pursuant to Rule 54(b), Fed.R.Civ.P., as to the antitrust claims against NCCI, R.3-80.

The Court of Appeals affirmed summarily on January 10, 1995. This petition follows in a timely manner.

Initial jurisdiction

The jurisdiction of the district court to hear and decide the antitrust claims presented is conferred by the provisions of 28 U.S.C. §§ 1331, 1332, and 1337.

REASONS FOR ALLOWANCE OF THE WRIT

1. To correct the course of the Eleventh Circuit, whose recent cases have unduly expanded and liberalized the scope of the "state action" doctrine:

> As with other exemptions, exceptions and immunities from the application of the antitrust laws, the "state action" doctrine should be strictly construed and narrowly applied. To find a "clearly articulated" State purpose, a court should not have to engage in speculation, supposition, conjecture, or the resolution of ambiguities. Presumptions and inferences limiting

the application of the antitrust laws should not be indulged.

Exemptions and exceptions to the antitrust laws are, of course, narrowly construed and are not readily implied, *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 3120 (1976) ("The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.' "); *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962) ("Immunity from the antitrust laws is not lightly implied"); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456 (1945) ("[I]t is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy."); see also the analysis and cases cited in dissent by Judge Godbold in *Alabama Power Co. v. Alabama Electric Coop., Inc.*, 394 F.2d 672, 680-89 (5th Cir., 1968). The Eleventh Circuit, however, has departed from this well-established rule.

In the ten years since this Court's decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Eleventh Circuit has consistently expanded the application of the "state action" doctrine by finding a "clearly articulated" State policy to displace competition in more and more ambiguous and uncertain circumstances. In a series of cases the Eleventh Circuit has permitted the doctrine's requirements to be eroded by holding that an anticompetitive action was "foreseeable" – and, thus, should be immunized under the holding of *Hallie* – if it merely "could reasonably have been anticipated" by the State legislature, and that the State has, therefore, sufficiently "clearly articulated" an anticompetitive policy. *See, e.g., Commuter Transp. Sys. Inc. v. Hillsborough County Aviation*

Auth., 801 F.2d 1286 (11th Cir.1986); *Central Florida Clinic for Rehabilitation, Inc. v. Citrus County Hospital Board*, 738 F.Supp. 459 (M.D.Fla.), aff'd without opinion, 888 F.2d 1396 (11th Cir.1989);[3] *Bolt v. Halifax Hosp. Medical Ctr.*, 891 F.2d 810, 825 (11th Cir., 1990); *McCallum v. City of Athens, Ga.*, 976 F.2d 649 (11th Cir., 1992); *Bolt v. Halifax Hosp. Medical Ctr.*, 980 F.2d 1381 (11th Cir., 1993); and *Askew v. DCH Regional Health Care Authority*, 995 F.2d 1033 (11th Cir., 1993). This construction trivializes and effectively eliminates one of the two prongs of the test for finding "state action".

This disturbing and destructive trend has continued and appears to have reached its apotheosis in the Eleventh Circuit's most recent articulation – the decision in *FTC v. Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir., 1994). In that case the Florida legislature had created and given certain powers to the Hospital Board of Lee County in 1963 (when there was only one hospital in Lee County, which was then acquired by the Board). Those powers included those which are routinely granted to a public hospital's board, including the power to acquire additional facilities. None of the powers granted, however, would necessarily adversely affect competition. Rather, each of the powers granted could have been exercised by the Board in a manner consistent with both its mission (provision of health services in Lee County) and the antitrust laws.

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[3] The Eleventh Circuit treats its "affirmed without opinion" dispositions as precedent, as is evidenced by the citation to and treatment of the *Central Florida* case in the *Lee County* case, below. *See also, e.g.*, the similar use of, citation to, and treatment of its summary affirmance in *Capeletti Bros. v. Broward County*, 738 F.Supp. 1415 (S.D.Fl., 1990), aff'd without opinion, 931 F.2d 903 (11th Cir.), in *Cone Corp. v. Hillsborough County*, 983 F.2d 197, 199 (11th Cir., 1993).

Instead, the Board sought to make what the FTC believed to be an anticompetitive acquisition of a competitor. The Court of Appeals held, however, that having been given the power to acquire other facilities it was, as a matter of law, "foreseeable" that the Board would exercise this power in an anticompetitive way. Thus, the Court of Appeals reasoned, the Board's action was immunized under the "state action" doctrine. *Lee County*, 38 F.3d, at 1191-92.

This construction is consistent with the Eleventh Circuit's expansive interpretation of "foreseeability" in its earlier cases:

- In the *Central Florida Clinic* case, "the Circuit affirmed the district court's application of *Parker* immunity. The district court determined that the power to operate hospitals and perform related services made it foreseeable that the public hospital board would monopolize the market for provision of outpatient services." *Lee County*, 38 F.3d, at 119.
- In *Bolt*, "the Circuit held that a statute authorizing a hospital to conduct peer review rendered it foreseeable that the hospital would engage in an anticompetitive boycott of certain physicians. [*Bolt*, 980 F.2d,] at 1386-87. . . . " *Lee County*, 38 F.3d, at 1190. "The Circuit further held that, in 'granting [the hospital board] the virtually unreviewable power to hire (or not hire) "agents and employees as may be advisable," the Florida legislature clearly articulated a policy to displace competition.' *Id.* at 1386." *Lee County*, 38 F.3d, at 1190.
- In *Commuter Transportation*, "[t]he Circuit . . . immunized conduct . . . where the anticompetitive conduct was with the range of reasonable possibilities contemplated by the legislature, even if it was not routine, ordinary, or inevitable. . . . (. . . [T]he power to develop and administer public airports in the Tampa area rendered foreseeable the anticompetitive result of . . . limitations on ground transportation

permitted to pick up passengers at the airport)." *Lee County*, 38 F.3d, at 1190.

The *Lee County* panel neatly summed up the Eleventh Circuit's current [mis]understanding of what is required to meet the first prong of the "state action" test (a "clearly articulated" policy of the State evidencing its intention to sanctify the resulting anticompetitive behavior): "[T]he Circuit has required only that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." *Lee County*, 38 F.3d, at 1190-91. "[A]ssuming that the Board was given powers to act exactly as private hospitals would act, the Board's anticompetitive conduct is not beyond the reach of *Parker* immunity, nor is the anticompetitive conduct *per se* unforeseeable." *Lee County*, 38 F.3d, at 1191, fn.5.

Thus, in the Eleventh Circuit, a State may delegate general corporate powers to a non-elected body it creates which may then, simply because it is for some purposes considered a "political subdivision" of the State, engage in any manner of anticompetitive conduct secure in the knowledge that its acts will be beyond the reach of the antitrust laws. This proposition extends the "state action" doctrine far beyond its intended purposes (insuring a due respect for federalism and state power to regulate economic affairs within its jurisdiction) and *certiorari* should be granted to limit the exemption to its proper bounds.

The Eleventh Circuit's overly-expansive and unduly enthusiastic embrace of the "foreseeability" language in *Hallie* (relating to the requirement of finding a sufficiently "clearly articulated" anticompetitive State policy) explains it summary treatment of the present case. If all a State need do to immunize collusive, anticompetitive conduct is to paint with a broad legislative brush in delegating power to an organization, then the affirmance by the Court of Appeals in this case is completely understandable. Indeed, if the state of the law is that this suffices to

"clearly articulate" an anticompetitive policy, then the first prong of the test for the "state action" doctrine has been effectively eliminated and the Court of Appeals would have been correct. Petitioners believe, however, that the "state action" doctrine, as defined by this Court, requires more and that the Eleventh Circuit has expanded the doctrine so that it encompasses (and immunizes) activities never contemplated by this Court.

a. To insure that no antitrust immunity is granted in the absence of a "clearly articulated" state policy:

> A State does not "clearly articulate" a policy to *displace* competition with regulation when, to the contrary, its statutory scheme provides, in part, that "(1) The Purposes of this part are . . . (b) To *encourage* independent action by, and reasonable price competition among, insurers. . . . ".

The Eleventh Circuit's affirmance, necessarily finding a "clearly articulated" policy, conflicts with the holding of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir., 1992). This Court should grant *certiorari* to insure that state policies *encouraging* competition, such as Florida's policy, are not permitted to be used as a shield against antitrust liability for collusive activity.

Florida's purposes in passing Chapter 627, Florida Statutes, are set out in §627.031, entitled "Purposes of this part; interpretation". It provides, in relevant part (emphasis supplied):

(1) The Purposes of this part are:

(a) . . . .

(b) *To encourage independent action by, and reasonable price competition among, insurers;*

> (c) . . . .
> (d) To authorize cooperation between insurers in ratemaking and other related matters.
> (2) It is the purpose of this part to protect policyholders and the public against the adverse effects of excessive, inadequate, or unfairly discriminatory insurance rates and to authorize the department to regulate such rates. . . .

This indicates that Florida, unlike the states whose regulatory schemes were under consideration in *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48 (1985), has "clearly articulated" a policy which is designed to ***en***courage (not ***dis***courage) "independent action by, and reasonable price competition among, insurers". It seeks to encourage such competition within the parameters of its regulatory scheme, as set out in the remainder of Chapter 627.

Such a statute can hardly be said to "clearly articulate" an anticompetitive policy. It is at least ambiguous and, at most, expresses a *pro*-competitive policy. Indeed, very similar language in Arizona's statutes[4] led the Ninth Circuit to hold that the "state action" immunity was not available because no "clearly articulated" anti-competitive purpose could be discerned from such language, *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392-393 (9th Cir., 1992). *Certiorari* should be granted to resolve this conflict between the Ninth and Eleventh Circuits concerning the

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[4] *Compare* A.R.S. §20-341:

> "Nothing in this article is intended to prohibit or discourage reasonable competition."

with Fl.Stat. §627.031:

> "(1) The Purposes of this part are . . . (b) To encourage independent action by, and reasonable price competition among, insurers. . . . "

resolution of ambiguities and competing policies in applying the "state action" doctrine.

Given the articulated purpose of encouraging competition, while discouraging rates which are "excessive, inadequate, or unfairly discriminatory", a reasonable reading of the statutory paradigm set out in Chapter 627 is that Florida has opted for competition except to the extent that there is active supervision of cooperative conduct in rate-making, but that such cooperative conduct even in rate-making is condoned *only* to the extent *necessary* to achieve Florida's other articulated purposes, *i.e.*, to insure that rates are not "excessive, inadequate, or unfairly discriminatory".

Much of the Respondent's conduct complained of here (*e.g.*, the agreement regarding designating employers as "assigned risks" and administration of the assigned risk plan pursuant to the carriers' "servicing agreements", the agreement as to the terms and conditions to be included in policy forms for LHWCA coverage, the agreement to boycott and coerce) is not necessary to achieve those purposes and is not regulated.

Since antitrust exemptions and immunities are to be narrowly construed, the joint action on "related matters" referred to in and permitted by the terms of §627.031(1)(d) must be only those which are necessary for rate-making – cooperative data collection, agreements as to the form of data submission and verification of data, etc. The statute is not authority for wide-ranging collusive activity by insurers.

b. To insure that no antitrust immunity is granted with respect to unsupervised collusive activity:

> A State should not be able to immunize from antitrust liability, under the "state action" doctrine, the actions of insurance carriers in *unsupervised* areas of conduct by providing limited approval of rate-making activities.

The Eleventh Circuit's affirmance, necessarily finding immunity for unsupervised activities, conflicts with holdings of the First Circuit, in *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138 (1st Cir., 1993), and of the Ninth Circuit, in *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir., 1988), and *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir., 1991), *aff'd in part, rev'd in part*, 113 S.Ct. 2891 (1993).

The First Circuit, in *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138 (1st Cir., 1993), undertook an extensive and quite correct analysis of collusive action by insurers in a factual context startlingly similar to this case. Both that case and this one allege an agreement to designate employers as "assigned risks" (by refusing to write coverage in the "voluntary market") in order to pressure regulators to raise rates (while, of course, evading the limitation on earnings imposed by the approved rates applicable to the "voluntary market"). The only significant difference between that case and this one is that in *Sandy River* the plaintiffs were *not* complaining of having been damaged by overcharges resulting from the collusive action resulting in their assignment to the "residual market" and here the Petitioners *are* doing so. As the First Circuit correctly pointed out:

> Had . . . plaintiffs sought . . . damages based on the boycott's direct market effects (such as reduced availability of insurance or higher

> prices resulting from reduced competition during the boycott period), they would have had a viable antitrust claim.
>
> *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1143 (1st Cir., 1993).

The plaintiffs in *Sandy River* lost because they had *not* sought such damages; the Petitioners here should prevail because they *have* done so – they seek damages and a declaration that any amounts in excess of the "standard premium" are illegal overcharges resulting from unlawful collusive action of the carriers.

In the "state action" context, as the Ninth Circuit has observed, "state approval of one activity is not state approval of a related but distinct activity, *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir., 1988)." *In re Insurance Antitrust Litigation*, 938 F.2d 919, 931 (9th Cir., 1991), *aff'd in part, rev'd in part*, 113 S.Ct. 2891 (1993). Each collusive activity must be evaluated separately to see if it is undertaken pursuant to a "clearly articulated" state policy which is "actively supervised" by the state.

This Court should grant *certiorari* to resolve this conflict among the Circuits concerning the applicability of the "state action" doctrine in the circumstances of this case (and other similar situations).

c. To define the necessary level of supervision of collusive rate-making before antitrust immunity may be granted:

> A State should not be able to immunize from antitrust liability, under the "state action" doctrine, the rate-making activities of insurance carriers by merely modifying the agreements as to rates which resulted from unsupervised collusive conduct.

The Eleventh Circuit's affirmance, necessarily finding that the rate-making supervision was sufficient, conflicts

with, and fails properly to apply, this Court's decision in *FTC v. Ticor Title Ins. Co.*, ___ U.S. ___, 112 S.Ct. 2169 (1992).

Perhaps most crucial on the issue of "active supervision" in rate-making is the failure of the insurance carriers and NCCI to provide the State of Florida with accurate, adequate data from which the Department can review the results of the carriers' collusive action. This failure has often been noted by the Department (see, for example, the many instances and criticisms cited by way of example in the Statement of Facts in this Petition).

Importantly, it is not just these Petitioners who have raised questions about the quality of the data submitted by NCCI to regulatory authorities. An examination of NCCI, commissioned by the National Association of Insurance Commissioners and made under the supervision of Florida's Department of Insurance, found that "NCCI's data quality and timeliness policies . . . require clarification and stronger enforcement. Current policies do not provide adequate incentives for carrier compliance.", Watford depo., p.92. Without accurate data, and without active supervision of the collusive data-assembly process (supervision of which has been delegated to the NCCI), there is insufficient "active supervision" by the State to confer antitrust immunity.

If it were otherwise, and the joint submission of unverified, inaccurate data were sufficient to raise the immunity shield, there would be no way to assure, in Justice Stevens' phrase, that a state agency was "evaluating the reasonableness of the prices charged", *Southern Motor Carriers*, 471 U.S., at 74, rather than merely ratifying or modifying a private price-fixing agreement. As this Court noted in *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S.Ct. 768, 776 (1990),

> "If all such conduct were immunized then, for example, competitors would be free to enter into

> horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. . . . " [*Allied Tube*, 486 U.S., at 503]. . . .

The "state action" doctrine requires much more involvement than has been shown here before regulatory oversight is permitted to substitute for free market forces.

We know that if Florida does not check the arithmetic underlying the rate filings, supervision would be deemed inadequate and we know that if requested data is not provided, the supervision cannot be deemed adequate, see *Ticor*, 112 S.Ct., at 2179. In fact, there is only limited checking even of NCCI's arithmetic and, for some filings, the underlying data from which the rate is to be calculated is not even provided by NCCI or checked by the Department (see Watford deposition, p.115). In addition, NCCI and the carriers have failed to provide Florida with requested information (see Statement of Facts, above, quoting from Watford deposition, p.126, and comments of James Watford at hearings).

In light of the fact that much, if not all, of the loss and expense data on which the rates for the "F" classifications are based is not data from Florida, but is nationwide,[5] it is difficult to see how any supervision of that rate-making can comport with the statutory requirements

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[5] See, *e.g.*, Exhibit NX 9 (from NCCI's 1989 revised rate filing, at pages N000770, N000773-778) and Exhibit NX 17 (from NCCI's 1992 revised rate filing, at pages N001792, N001795-1800).

See also, Exhibit NX 4 (Hearing of October 23, 1989, at page N010782 [Commissioner Gallagher asks "Why would we be using nationwide expense figures instead of Florida expense figures in regard to this?"]) and page N010784 [the Commissioner states: " . . . all of a sudden expenses are nationwide. Are there other items that are nationwide too that . . . I haven't picked up . . . ?"]).

(which refer to profit "from *Florida* business"). Thus, the "state action" defense is not available.

Appendix B-V-III (Exhibit NX 17, pages N001801-1804) sets out the method by which the "final indicated rates" are to be derived from the "proposed pure premiums". There are 12 different factors which must be applied to the "proposed pure premium":

(1) an offset for assigned risk programs;
(2) an offset for voluntary premium discounts;
(3) a premium level change limit factor;
(4) and (5) a benefit level change factor (state and federal);
(6) an indemnity assessment change factor;
(7) a ratio of manual to earned premium factor;
(8) an expense allowance factor;
(9) an aggregate update factor;
(10) a test correction factor (which includes "an iterative process");
(11) a limitation for "swing"; and
(12) a federal-state comparison limitation.

There is no evidence in the record that the derivation of any of these factors is checked for accuracy, or that the data underlying the calculation of any of these factors is available to or is checked for accuracy by the Department, nor is the "iterative process" which is applied anywhere described nor is it amenable to verification. These are all merely numbers presented to the Department as a result of the unsupervised collusive efforts of the carriers under the aegis of the NCCI.

For all of the inadequacies of the rate filing for 1992, at least some of the asserted payroll and loss data (from which the "pure premiums" were supposedly derived) for each "F" class were made available to the Department. See Exhibit NX 17, pages N001795-1800. The data

may not have been checked for accuracy, but at least the numbers agreed upon by the carriers were presented to the Department. This is not always true. For instance, nowhere in the rate filing for 1990, or in the revised filing for that year (Exhibit NX 12, pages N001113, et seq.), or in the supplemental information supplied at the request of the Department (Exhibit Pl 67), was any such data presented by NCCI. Nevertheless, the "pure premium" figures used by NCCI were accepted by the Department without question.

If the State of Florida intends to substitute its regulatory system for the market forces which would otherwise prevail, however, and if it wants to shield the participants from the operation of the antitrust laws, it must be considerably more involved and do considerably more in the way of supervision.

2. To define the nature and scope of LHWCA preemption:

The Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§901, et seq., and the regulations promulgated pursuant to the Act, should preempt state regulation of the subjects covered by the Act.

The Eleventh Circuit's affirmance, necesssarily finding that there is no preemption, conflicts with (and ignores the constitutional limitations explained in) this Court's opinions in *Southern P. Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438 (1920), and *Washington v. Dawson & Co.*, 264 U.S. 219, 228, 44 S.Ct. 302 (1924).

In *Jensen*, this Court struck down New York's worker's compensation law as applied to employees within the admiralty jurisdiction (such as those now within the coverage of the LHWCA) because the field

was preempted by the Constitution. After this Court decided the *Jensen* case, Congress passed a statute which attempted to save to workers their rights and remedies under state workmen's compensation laws, 40 Stat. 395 (1917). This Court struck down the attempt in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438 (1920), as an unconstitutional delegation of power:

> The Constitution itself adopted and established, as part of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations.
>
> *Knickerbocker Ice Co.*, 253 U.S. at 160.

Congress tried again, by enacting a statute which excluded masters and crew members, 42 Stat. 634 (1922). Again, the Court struck it down, holding that "the manifest purpose [of the statute] was to permit any state to alter the maritime law, and thereby introduce conflicting requirements", *Washington v. Dawson & Co.*, 264 U.S. 219, 228, 44 S.Ct. 302 (1924).

Finally, the Congress passed the LHWCA, 44 Stat. 1424 (1927), which reserved to the national government the regulation of workers' compensation for those injured within the admiralty jurisdiction of the United States and which undertook such regulation as was thought necessary of carriers providing such coverage. Thus the case law and the statutes passed in response to the decisions leave no room for State regulation of LHWCA coverage

and no "state action" exemption, based on state regulation, can apply.

The courts below held that the pre-emptive effect of the *Jensen* trilogy of cases extends no further than the preemption of state authority over benefits. Since a state's power to prescribe remedies is, without question, limited – having been preempted – its power to regulate the conduct which gives rise to the need for those remedies must be preempted as well, else uniformity is compromised.

It is well settled that the LHWCA preempts State workers compensation law to the extent that it applies, *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 (5th Cir., 1988). See also, *e.g., Merritt-Chapman & Scott Corp. v. Bassett*, 50 F.Supp. 488 (D.Mich., 1943); *Ford v. Parker*, 52 F.Supp. 98 (D.Md., 1943). Although these cases are concerned with the exclusiveness of a worker's remedies, and do not refer explicitly to the regulation of carriers, it would be inconsistent to hold that a federal law preempts only the remedies given by state law while allowing the state to regulate the conduct which gives rise to the need for a remedy.

As the Fifth Circuit said, "it is difficult to imagine a more comprehensive scheme of federal regulation – one that leaves no room for state involvement – than that contained in the LHWCA." *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406, 1412 (5th Cir., 1987), vacated on other grounds, 862 F.2d 491 (5th Cir., 1988) (*en banc*). Under the LHWCA, the Secretary of Labor is given broad administrative power to issue rules and regulations, 33 U.S.C. §939(a). The Secretary of Labor has *used* this power and *has* promulgated regulations for the administration of the LHWCA, 20 C.F.R. §§701-704.

The LHWCA includes provisions relating to insurance carriers, *e.g.*, 33 U.S.C. §932 (relating to authorization by the Secretary of carriers). Part 703 (20 C.F.R. §703.001, et seq.) of the regulations implements those statutory provisions and is entitled "Insurance Regulations". It governs "the authorization of insurance carriers. . . . ", *ibid*. The regulations are detailed concerning the application for authority and certification of carriers "to write insurance under this Act." 20 C.F.R. §703.102. Notably, §703.105 states:

> With each application for authority to write insurance there shall be submitted for the approval of the Office copies of the forms of policies which the applicant proposes to issue in writing insurance under the LHWCA . . . to which shall be attached the appropriate endorsement to be used in connection therewith.

The Secretary has thus undertaken to supervise the content of the policies issued for LHWCA coverage (and must have, therefore, preempted state regulation of the same subject). In light of this pervasive scheme of regulation, it should be held that the States are left with no power to regulate rates (or other conduct of carriers) in connection with the writing of LHWCA coverage and, therefore, no "state action" exemption applies.

The regulations are, indeed, pervasive with respect to matters other than "benefits"; as with the statutory provisions noted above, they go to the heart of the "business of insurance." Among other things, the regulations:

a. limit the types of companies which may be eligible to write LHWCA coverage, 20 C.F.R. §703.101;

b. set out what information must be contained in an application for authority to write such coverage, 20 C.F.R. §703.102;

c. require submission of copies of the forms of policies proposed to be issued for LHWCA coverage, 20 C.F.R. §703.105;

d. require the procurement of a certificate of authority from the federal office, 20 C.F.R. §703.106;

e. set out the form of endorsement which must be used by the carrier for LHWCA coverage, 20 C.F.R. §703.109;

f. require federal approval of any new or modified forms of policies and endorsements, 20 C.F.R. §§703.110, 703.111;

g. set a minimum duration for policies, 20 C.F.R. §703.112;

h. govern notices of cancellation, 20 C.F.R. §703.114;

i. define the relationship and obligations of the carrier to the employer (the insured), 20 C.F.R. §703.115; and

j. require reports to be made of policies written, 20 C.F.R. §§703.116 – 703.121.

The *Texas Employers* panel was correct that "it is difficult to imagine a more comprehensive scheme of federal regulation – one that leaves no room for state involvement – than that contained in the LHWCA." This Court should also so hold.

If the lower courts in this case were correct, and if the LHWCA preemption were as limited as they held, then the cases holding that state law remedies are unavailable to remedy collateral misconduct by carriers (*e.g.*, for "bad faith failure to pay") would have necessarily been wrongly decided. Under the narrow interpretation of the scope of the LHWCA found below, any state remedy imposing liability on a carrier for "bad faith" failure to pay justified claims under the LHWCA should *not* be preempted because such remedies would simply serve

better to insure the accomplishment of the goal of the LHWCA (timely payment of the uniform benefits defined by the Act) and would not distort the uniformity of the benefits available *under the Act*.[6]

Those state law remedies have nothing to do with the uniformity of benefits available *under the LHWCA*. They simply afford separate and additional remedies to redress injury suffered as the result of collateral conduct of the carriers. Such remedies speak *not* to the level of benefits available but, rather, to the consequences of the conduct of carriers and, under the NCCI's interpretation, should be available to workers. This is *not* what the cases have held, however. The cases have read the LHWCA preemption more broadly and have held that such ancillary remedies are not available. Thus the preemptive effect of the LHWCA must be more broad than that found by the lower courts.

Indeed, this conclusion becomes obvious when it is observed that, under the LHWCA, an employer's carrier is an "employer" in the statutory scheme, *Atkinson*, 838 F.2d at 811, and that if the employer so chooses, it may self-insure the LHWCA risk, *see* 20 C.F.R. §§703.301 – 703.312. No state regulation of the self-insurance of risk is contemplated by the statutes or the regulations. If the lower courts' narrow view of the preemptive scope of the LHWCA were correct, and carriers were not regulated exclusively by the Secretary of Labor but self-insurers were, then the conduct of self-insurers would be regulated at the national level, the conduct of insurance carriers would be regulated at the state level (by 50 different

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[6] Compare, *e.g.*, *Askew v. American Waterways Operators*, 411 U.S. at 337 ("the [Ports and Waterways Safety] Act does not prevent 'a State . . . from prescribing . . . higher safety equipment or safety standards than those which may be prescribed pursuant to this title.' ").

bodies), and the potential for establishment of different standards of conduct would be rampant, undermining the articulated need for uniformity.

State regulation of *all* aspects of coverage under the LHWCA – not merely on the "benefits" side – is pre-empted. This Court should grant *certiorari* to correct this error of the lower courts.

CONCLUSION

For all of the foregoing reasons, this Court should grant *certiorari*, reverse the Court of Appeals' affirmance of the district court's order granting the summary judgment to the Respondent and its order denying the Petitioners' motion for partial summary judgment, and this matter should be remanded for further proceedings.

Respectfully submitted,

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App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2331

D.C. Docket No. 92-1576-CIV-21A

GULF MARINE REPAIR, HENDRY CORPORATION,

Plaintiff-Counter-
Defendant-Appellant,

versus

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Counter-
claimant,

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(January 10, 1995)

Before BIRCH and DUBINA, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GULF MARINE REPAIR CORPORATION, and, THE HENDRY CORPORATION,

Plaintiffs,

v. CASE NO. 92-1576-CIV-T-21A

LIBERTY MUTUAL INSURANCE COMPANY, and NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on plaintiffs' **Motion for Partial Summary Judgment (or For A Preliminary Legal Determination) Regarding Federal preemption**(doc. 21) and defendants' **Motion for Summary Judgment Dismissing Plaintiffs' Antitrust Claims Based on the State Action Immunity Doctrine** (doc. 34).[1] The Court has considered the motions and the memoranda, the responses and the reply memoranda, the exhibits, the arguments of counsel and is otherwise fully advised in the premises. For the reasons set forth below, the Court recommends that the **Motion for Partial Summary Judgment (or For A Preliminary Legal Determination) Regarding Federal Preemption** (doc. 21) be denied and defendants' **Motion for Summary Judgment Dismissing**

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[1] This matter was specifically referred to the Magistrate Judge to conduct such proceedings as are necessary for the submission of a report and recommendation (doc. 49).

Plaintiffs' Antitrust Claims Based on the State Action Immunity Doctrine (doc. 34) be granted.

I. Factual Background

Plaintiffs Gulf Marine Repair Corporation and The Hendry Corporation (collectively referred to as "Gulf Marine") commenced this lawsuit in October 1992 against Liberty Mutual Insurance Company ("Liberty") and National Council on Compensation Insurance ("NCCI"). The transaction which is at issue in this cause surrounds plaintiffs' purchase of workers' compensation insurance from Liberty for coverage from January 1, 1989, to March 31, 1992, in accordance with the Florida Workers' Compensation Act[2] ("FWCA") and the Longshore and Harbor Workers' Compensation Act[3] ("LHWCA").

Under the FWCA, an employer must secure workers' compensation insurance from an insurance carrier or self-insure. If an employer does not choose to self-insure or cannot obtain coverage from a carrier voluntarily, the employer may obtain workers' compensation insurance form [sic] Florida's Workers' Compensation Insurance Plan ("WCIP").

Pursuant to FWCA, NCCI has been designated by the Department of Insurance (DOI) as the Administrator of Florida's WCIP. Gulf Marine applied to and was accepted to Florida's WCIP. NCCI placed Gulf Marine in the

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[2] Fla. Stat. § 440.01 *et seq.*

[3] 33 U.S.C. § 901, *et seq.*

Assigned Risk Rating Program ("ARRP").[4] Pursuant to WCIP, NCCI assigned Liberty to serve as plaintiffs' insurance or servicing carrier. Subsequently, in March 1992, plaintiffs chose to obtain workers' compensation insurance coverage by joining a self-insurance group.

Plaintiffs filed a four count Complaint in October 1992. Counts I and II allege that defendants violated federal and state antitrust statutes. Counts III and IV allege invalidity of contract and breach of contract. Liberty filed a counterclaim alleging that plaintiffs owe approximately one million dollars in unpaid premiums for insurance coverage provided from 1989 to 1992.

II. Discussion

The parties have filed motions for summary judgement on the grounds of federal preemption and based on the state action immunity doctrine. Prior to addressing the pending motions, the Court finds it appropriate to set forth the legal framework within which the Court must review the motions for summary judgment. Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

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[4] ARRP is a retrospective rating plan where an insured's premium for the policy period is calculated on the basis of the losses experienced by the insured during the period the policy is in effect. A prospective rating plan is where an insured's premium for the policy period is calculated on the basis of the losses experienced in past periods by the insured. See Plaintiffs' Motion for Partial Summary Judgment Regarding Preemption (doc. 21) at 5.

of law." F.R.Civ.P. 56(c). More specifically, the moving party "bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

In determining whether the movant has met this burden, the court must view the evidence and all permissible factual inferences in a light most favorable to the non-moving party. *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). Next, the "non-moving party . . . bears the burden of coming forward with sufficient evidence of every element that he or she must prove." *Rollins v. Techsouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). That is, if the non-moving party's evidence is "merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Essentially, "the inquiry . . . is . . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. With this in mind, the Court will focus its attention on the plaintiffs' motion for summary judgment regarding federal preemption and then turn its attention to defendants' motion for summary judgment based on the state action immunity doctrine.

A. Federal Preemption

Plaintiffs' [sic] contend that the States are prohibited from or lack the authority to regulate the conduct of

insurance carriers in connection with LHWCA coverage. Plaintiffs allege that the United States Constitution and the LHWCA precludes States from regulating subjects covered by the LHWCA or setting insurance rates in connection with coverage under the LHWCA. Defendants respond by arguing that there is no federal preemption and that their actions were protected by the state action doctrine and the McCarran-Ferguson Act. The Court will address each claimed source of federal preemption in turn.

1. Constitutional Preemption

Plaintiffs argue that States lack the authority under the Constitution[5] to regulate subjects relating to or covered by the LHWCA. In essence, plaintiffs argue that federal law exclusively governs every aspect of workers' compensation for maritime employees for injuries which occur within the admiralty and maritime jurisdiction of the United States, including every aspect and/or activity of insurance carriers in connection with supplying coverage under the LHWCA. Plaintiffs rely heavily upon *Southern P. Co. v. Jensen*,[6] *Knickerbocker Ice Co. v. Stewart*,[7] and *Washington v. Dawson*[8] to support their theory of constitutional preemption.

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[5] U.S. Const. art. III, § 2 provides in pertinent part as follows:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction;

[6] 244 U.S. 205 (1917).

[7] 253 U.S. 149 (1920).

[8] 264 U.S. 219 (1924).

In *Jensen*, the Supreme Court held a New York Compensation law unconstitutional because the remedy provided in admiralty was the exclusive remedy available to maritime workers. In *Knickerbocker*, the Supreme Court held that Congress exceeded its authority when it attempted to transfer it [sic] power to enact "legislat[ion] concerning the rights and liabilities within the maritime jurisdiction and remedies for their enforcement." 253 U.S. at 164. The Court, in *Dawson*, held that the Washington statute which compelled maritime employers to contribute to a state workers' compensation fund for its workers, excluding masters and crew members, was unconstitutional. The Court opined that "[w]ithout doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States." *Dawson*, 264 U.S. at 227. Thus, as defendants contend, the Court has indicated that Congress' authority is exclusive with regard to the remedies available to maritime employees and the liabilities of maritime employers.

However, the Supreme Court has not given *Jensen* and its progeny the broad reading that plaintiffs urge upon the Court. In fact, the Supreme Court has explicitly indicated that *Jensen* and its progeny are limited to their facts. *See Romero v. International Term. Co.*, 358 U.S. 354 (1959); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 344 (1973). In *Romero*, an injured Spanish crew member sued his Spanish employer and a New York corporation under the Jones Act and under the general

maritime law for unseaworthiness, maintenance and cure and negligence and the court dismissed the complaint for lack of jurisdiction. The Supreme Court, reversing, reasoned that:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the Courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplication of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. *But this limitation still leaves the States a wide scope.*

358 U.S. at 373 (footnotes omitted and emphasis added). Thus, this is an explicit indication that the States are not completely precluded from regulating with respect to every matter which relates to maritime jurisdiction. Additionally, in *Askew*, the Court upheld Florida's ability to enact the Florida Oil Spill Prevention and Pollution Act which provided for the state's recovery of cleanup costs incurred in connection with oil spills caused by oil handling facilities and ships. The Court reasoned that:

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. . . .

> *Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.*

411 U.S. at 341 (emphasis added). Thus, the Court held that there was no constitutional or statutory prohibition against permitting Florida to impose liability for costs incurred in cleaning up oil spills. Therefore, contrary to plaintiffs' assertions, the Constitution does not completely bar States from enacting legislation covering all subjects which relate to admiralty or to maritime jurisdiction.

2. Statutory Preemption

Plaintiffs contend that the LHWCA precludes the States from regulating subjects relating to the LHWCA. However, plaintiffs concede that the LHWCA does not *explicitly* bar States from enacting legislation relating to maritime jurisdiction or the regulation of insurance carriers providing coverage under the LHWCA. Thus, plaintiffs urge the Court to *imply* that Congress intended to preempt the field.

Two forms of preemption have been recognized: expressed and implied. *Gade v. National Solid Wastes Management Assn.*, ___ U.S. ___, 112 S. Ct. 2374, 2383 (1992). In the absence of express statutory language indicating preemption, the Court has recognized implied preemption in two instances:

> [F]ield preemption, where the scheme of federal regulation is " 'so pervasive as to make reasonable the inference that Congress left no room for

> the States to supplement,' " [*Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S.141, 153, 102 S. Ct. 3014, 3022 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947)), and conflict preemption, where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (citations omitted).

Gade, supra, at 2383. The Court will examine the applicability of field and conflict preemption to the facts of the instant case.

a. Field Preemption

The LHWCA is a comprehensive scheme of federal regulation enacted to ensure uniformity. However, the LHWCA is a comprehensive statute with regard to rights and remedies. *See* 20 C.F.R. §§ 701 *et seq.* (1993). Plaintiffs contend that the LHWCA leaves no room for state regulation because the Secretary of Labor has broad administrative power to promulgate rules and regulations and that the Secretary has issued regulations which preclude the States from regulating carriers that write LHWCA insurance. It is true that the regulations, promulgated by the Secretary, contain provisions which relate to the authorization and certification of insurance carriers that wish to write coverage under the LHWCA. Although the "Insurance Regulations" deal with insurance carriers and companies that decide to self-insure, they do so in a very

limited manner. The regulations deal primarily with the process of becoming an authorized carrier, submission of the forms and policies to be issued or used in writing coverage, and the carriers [sic] financial stability and ability to provide coverage. The regulations outline the responsibilities and requirements that the Office of Workmen's Compensation Programs ("OWCP") imposes before a carrier can qualify to write coverage under the LHWCA. However, what the regulations do not purport to do is regulate the relationship between the insurance carrier and the employer.

In *Gade, supra,* the Court concluded that Congress intended to preempt the field when it enacted the Occupational Safety and Health Act, unless the States submitted a plan and received permission from the Secretary of Labor to implement their own occupational safety and health standards. *Gade, supra,* at 2383. However, in this instance, there is no indication that Congress intended that the Secretary regulate the setting of insurance rates by authorized insurance carriers. It is true that the LHWCA requires carriers to submit their policies to OWCP for approval. Thus, there is an intent to regulate the content of the policies issued to maritime workers. However, this does not manifest an intent to regulate every activity of the insurance carrier.

b. Conflict Preemption

The purpose of the LHWCA is to provide maritime workers with a uniform system of workers' compensation law. *See* 33 U.S.C. § 901 *et seq.* Plaintiffs argue that permitting the States to regulate the setting of insurance rates

would pose an "obstacle to the accomplishment and execution of" Congress' purposes and objectives in enacting the LHWCA. Plaintiffs do concede, however, that compliance with both federal and state regulations is not a physical impossibility.

Plaintiffs have not sufficiently demonstrated that state regulation of insurance carriers will impede uniformity in this area. Thus, whether or not the States regulate the setting of insurance rates, maritime workers will still have a uniform system of workers' compensation law and still receive the same rights and remedies under the LHWCA. Therefore, the Court concludes that no conflict exists between the federal statute and Florida's ability to regulate insurance carriers.

3. McCarran-Ferguson Doctrine

The McCarran-Ferguson Act (the "Act")[9] was enacted to ensure "continued regulation and taxation by the

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[9] 15 U.S.C. § 1012 provides in pertinent part as follows:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

several States of the business of insurance. . . . " 15 U.S.C. § 1011. Without doubt, Fla. Stat. Chapter 627 was enacted for the purpose of regulating the business of insurance within the meaning of the Act.

In *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), the Supreme Court had the opportunity to examine the scope of the Act. In *SEC*, the Securities and Exchange Commission challenged Arizona's Insurance Director's ability to approve a merger between two insurance companies because of alleged securities violations. The Court held that the Act barred the relief sought. Although the Act provided little help in the way of determining the meaning of the phrase "business of insurance", the Court reasoned that:

> The statute [McCarran-Ferguson Act] did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to the laws "regulating the business of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply. *Certainly the fixing of rates is part of this business;*

SEC, supra, at 459-60 (emphasis added). Thus, the Court made it very clear that the "business of insurance" included the setting of insurance rates. Hence, the Act – which saves to the States the ability to regulate the "business of insurance" – is applicable and the State of Florida has the right to regulate the setting of insurance rates.

B. State Action Doctrine

Defendants have filed their motion for summary judgment based on the state action immunity doctrine. Defendants contend that all of their actions – including assigning plaintiffs to ARRP and proposing filing rates – are protected by the state action immunity doctrine.

The Florida Department of Insurance established the Florida Bureau of Workers' Compensation in 1990. The Property and Casualty Rates and Forms division of the Department of Insurance is responsible for regulating the day-to-day activities of workers' compensation with regard to insurance rates and form functions.

Defendants allege that the insurance coverage at issue was provided pursuant Florida's Workers' Compensation Insurance Plan. Additionally, NCCI alleges that DOI designated it as the Administrator of Florida's WCIP. Thus, NCCI contends that it was authorized to assign insurance applicants to an insurance carrier for servicing of the applicant's workers' compensation insurance needs. Plaintiffs respond by arguing that the state action doctrine is not applicable. Plaintiffs also argue that each "collusive activity" must be evaluated separately to determine whether there is a "clearly articulated" state policy and, if so, whether it is "actively supervised" by the State of Florida.

The state action immunity doctrine was first articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). More recently, the Court had an opportunity to re-visit the state action doctrine in *F.T.C. v. Ticor Title Ins. Co.*, ___ U.S. ___, 112 S. Ct. 2169 (1992). In *Ticor*, the Court reiterated the two-prong test set forth in *California*

Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937 (1980) which must be applied to determine whether the state action doctrine has been established. Under the *Midcal* test, the Court must first determine whether "the State has articulated a clear and affirmative policy to allow the anticompetitive conduct," and second, whether "the State provides active supervision of anticompetitive conduct undertaken by private actors." *Ticor, supra*, at 2175 (citing *Midcal, supra*, at 105, 100 S. Ct. at 943).

1. Clearly Articulated Policy

Plaintiffs contend that the State of Florida acting through the state Legislature has not articulated a clear and affirmative policy to permit anticompetitive behavior. In essence, plaintiffs argue that only the Legislature, not a state agency, can immunize anticompetitive conduct. The Court concurs with plaintiffs' assessment. In *Southern Motor Carriers Rate Conf. v. U.S.*, 471 U.S. 48 (1985), the Court concluded, relying on *Goldfarb v. Virginia*, 421 U.S. 773 (1975), that a state agency, acting alone, could not provide immunity to private parties. *Southern Motor, supra*, at 60. Further, the Court determined that the state policy need only be permissive, not compulsive or mandatory, before the state action doctrine can be established.

In *Southern Motor*, the Court determined that the Mississippi Legislature had not specifically addressed collective ratemaking, but rather, had expressed its intent to displace competition by prescribing a "just and reasonable rate." 471 U.S. at 63. In this instance, the Florida

Legislature has also authorized anticompetitive behavior. In Fla. Stat. § 627.031,[10] the Legislature set forth the purposes of the Chapter and expressed its intent to displace the market system. Although the Florida Legislature indicated that it "encourages independent action by, and reasonable price competition among, insurers," the Legislature does authorize "cooperation between insurers in ratemaking." *See* Fla. Stat. § 627.031. The purpose of the statute, as expressed by the Florida Legislature, is to "regulate insurance rates" to ensure that they "shall not be excessive, inadequate or unfairly discriminatory." *Id.* Thus, like in *Southern Motor*, the State of Florida has clearly articulated its intent to have the insurance rates set by the regulatory agency and not the market. The Court in *Southern Motor* reasoned that the first prong of *Midcal* is satisfied if the "State as sovereign clearly intends to displace competition in a particular field with a regulatory structure." *Southern Motor, supra,* at 64. Thus,

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[10] Fla. Stat. § 627.031 (1984 & Supp. 1993) provides in pertinent part as follows:

> (1) The purposes of this part are:
> (a) To promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate, or unfairly discriminatory;
> (b) To encourage independent action by, and reasonable price competition among, insurers;
> (c) To authorize the existence and operation of qualified rating organizations and advisory organizations and to require that specified rating services of such rating organizations be generally available to all authorized insurers; and
> (d) To authorize cooperation between insurers in ratemaking and other related matters.

the Court concludes that the Florida Legislature has not only authorized "cooperation between insurers in rate-making" but has also clearly articulated its intent to displace competition with its own regulatory scheme.

2. Active State Supervision

Plaintiffs also contest whether the State of Florida hasmet the active supervision requirement of *Midcal*. The purpose of the second prong "is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor, supra,* at 2177. In *Ticor,* the Supreme Court held that the second prong of Midcal was not satisfied because, under the negative option regimes[11] used in Montana and Wisconsin, the States did not substantially participate in the rate setting scheme. In essence, the Court concluded that the "potential for state supervision was not realized in fact." *Ticor, supra,* at 2179. The Court reasoned that "[w]here prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the pricefixing [sic] or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.*

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[11] Under a negative option system, the rate filings submitted automatically become effective within a specified period of time unless they are rejected by the State.

In this case, Florida does not operate a negative option regime. In fact, under the Florida system, rate filings shall not become effective until and unless DOI expressly approves the filing submitted.[12] *See* Fla. Stat. § 627.111. Defendants have presented evidence, which has not been sufficiently disputed, that Florida actively participates in the setting of insurance rates. Under Florida's system, the department has the authority to conduct public hearings and has done so. Mr. James D. Watford, an actuary for DOI, was designated by DOI to testify as a representative and testified that DOI has regularly conducted public hearings to review the rate filings submitted by defendant NCCI. *See generally Watford* depo. Mr. Watford has also testified that only once in the last decade has NCCI's filing been approved based upon its

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[12] Fla. Stat. § 627.111 provides as follows:

Effective date of filing

(1) If, Pursuant to s. 627.101(3), the department determines to hold a public hearing as to a filing, or it holds such a public hearing pursuant to request therefor under s. 627.101(4), it shall give written notice thereof to the rating organization or insurer that made the filing and shall hold such hearing within 30 days after commencement of the public inspection period provided for in s. 627.1011(2) or (4); and, not less than 10 days prior to the date of the hearing it shall give written notice of the hearing to the insurer or rating organization that made the filing. The department may also, in its discretion, give advance public notice of such hearing by publication of notice in one or more daily newspapers of general circulation in this state.

(2) if the order of the department disapproves the filing, the filing shall not become effective during the effectiveness of such order. If the order of the department approves the filing, the filing shall become effective upon the date of the order or upon such subsequent date as may be satisfactory to the insurer or rating organization that made the filing.

initial filing. Watford depo. at 68-69. Mr. Watford also testified that the department reviewed and approved rate filing and forms for "F" classifications which include the LHWCA coverage. Watford depo. at 43-44. Additionally, Mr. Watford testified that in his opinion Florida's supervision of insurance carriers is more intensive than most other states. Watford depo. at 73-74.

Plaintiffs further argue that the department's supervision is inadequate because the information or data submitted by NCCI and used in setting the proposed rates contains errors. However, the Supreme Court stated that "the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulation practices. Its purpose is to determine whether the State has exercised sufficient independent judgment. . . . The question is not how well state regulation works but whether the anti-competitive scheme is the State's own." *Ticor, supra,* at 2177. Thus, plaintiffs [sic] concern with the quality of the data submitted is an issue that DOI must contend with and not the Court.

III. Conclusion

Summary judgment is appropriate in this case. As the Court compares the evidence and exhibits submitted by plaintiffs and defendants, there is an absence of a genuine issue of material fact and it appears that the parties have purely legal disputes. Thus, for the foregoing reasons, the Court recommends that:

1. Plaintiffs **Motion for Partial Summary Judgment (or For A Preliminary Legal Determination) Regarding Federal Preemption** (doc. 21) be **DENIED.**

2. Defendants' **Motion for Summary Judgment Dismissing Plaintiffs' Antitrust Claims Based on the State Action Immunity Doctrine** (doc. 34) be **GRANTED.**

So recommended this 13th day of September, 1993.

/s/ Charles R. Wilson
CHARLES R. WILSON
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

Failure to file and serve written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date it is served on the parties shall bar an aggrieved party from a *de novo* determination by the District Court of issues covered in the report, and shall bar the party from attacking on appeal factual findings in the report accepted or adopted on appeal by the District Court except upon grounds of plain error or manifest injustice. 28 U.S.C. § 636(b)(1)(C); Local Rule 6.02; *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982)(en banc).

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GULF MARINE REPAIR CORPORATION, and THE HENDRY CORPORATION, Plaintiffs, vs. LIBERTY MUTUAL INSURANCE COMPANY, and NATIONAL COUNCIL ON COMPENSATION INSURANCE, Defendants.	Civil Action Number 92-1576-CIV-T-21A (Filed March 8, 1994)

FINAL JUDGMENT AS TO DEFENDANT NATIONAL COUNCIL ON COMPENSATION INSURANCE

THIS MATTER came before the Court on Defendant, National Council on Compensation Insurance's ("NCCI") Motion for Entry of final Judgment, pursuant to Rule 54(b), Fed. R. Civ. P. In support of its motion, NCCI has submitted a joint stipulation of counsel, in which counsel for plaintiffs and counsel for NCCI state that there is not just reason for delay in entering final judgment in favor of defendant NCCI in accordance with this Court's January 13, 1994 Order granting summary judgment in NCCI's favor dismissing plaintiffs' antitrust counts, the only claims asserted against NCCI herein. The Court, having reviewed the motion and joint stipulation, and based upon all documents, records and proceedings herein, hereby ORDERS:

That, there being no just reason for delay, final judgment be entered pursuant to Rule 54(b), Fed. R. Civ. P., in favor of defendant NCCI, dismissing plaintiffs' Complaint against NCCI on the merits and with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida on this 7th day of March, 1994.

/s/ Ralph W. Nimmons, Jr.
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Keith E. Rounsaville, Esquire
Richard G. Braman, Esquire
Herbert P. Schlanger, Esquire
Michael A. Fogarty, Esquire
Melissa Fletcher Allaman, Esquire

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GULF MARINE REPAIR CORPORATION and THE HENDRY CORPORATION

Plaintiffs

V.

LIBERTY MUTUAL INSURANCE COMPANY and NATIONAL COUNCIL ON COMPENSATION INSURANCE

Defendants

_____/

CASE NO. 92-1576-CIV-T-21A

(Filed Jan. 13, 1994)

ORDER

This cause came before the Court on Plaintiff Gulf Marine Repair Corporation ("Gulf Marine") and The Hendry Corporation's ("Hendry") Motion for Partial Summary Judgment (or For A Preliminary Legal Determination) Regarding Federal Preemption (Dkt. #21) and on Defendant Liberty Mutual Insurance Company ("Liberty") and the National Council on Compensation Insurance's ("NCCI") Motion for Summary Judgment Dismissing Plaintiffs' Antitrust Claims Based on the State Action Immunity Doctrine (Dkt. #34).

These matters were considered by the United States Magistrate Judge pursuant to a specific order of referral (Dkt. #49). The Magistrate Judge has filed his report

recommending that Plaintiffs' Motion for Partial Summary Judgment (or For A Preliminary Legal Determination) Regarding Federal Preemption be denied and that Defendants' Motion for Summary Judgment Dismissing Plaintiffs' Antitrust Claims Based on the State Action Immunity Doctrine be granted.

Plaintiffs have filed timely objections to the Magistrate Judge's Report and Recommendation (Dkt. #61). Rule 6.02, Local Rules, Middle District of Florida, and Title 28 U.S.C. §636(b)(1) provide that when a party objects to a magistrate's report and recommendation, the Court must make a *de novo* determination of those portions of the report to which objections have been made. A judge may then accept, reject, or modify, in whole or in part, the recommendations made by the magistrate. Accordingly, the Court has conducted a *de novo* review of those portions of the Magistrate Judge's report to which Plaintiffs have objected. Although the Court has reviewed and fully considered the 18 objections filed by Plaintiffs, this Order will address only those objections which require discussion.

A brief review of the events giving rise to this action places Plaintiffs' objections in context. Plaintiffs purchased workers' compensation insurance from Liberty which provided coverage from January 1, 1989 to March 31, 1992. Plaintiffs purchased this insurance in accordance with the Florida Workers' Compensation Act ("FWCA"), Fla. Stat. §440.01, *et seq.*, and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §901, *et. seq.*, The LHWCA requires an employer to provide certain workers' compensation benefits for employees who engage in covered maritime activities. Additionally,

pursuant to the FWCA, an employer is required to obtain workers' compensation insurance from an insurance carrier or to self-insure. If an employer cannot obtain coverage and does not choose to self-insure, the employer can obtain insurance from the Florida's Workers' Compensation Insurance Plan ("WCIP"). Defendant NCCI is a data-gathering organization which acts as the rating bureau for the State of Florida and as administrator of the WCIP program. In 1989, Risk Rating Program ("AARP"), a program governing premium calculations for Florida's WCIP. The AARP did not exist when Plaintiffs applied for coverage in 1988, but the program required retrospective rating for certain insured parties, including Plaintiffs.

Plaintiffs were accepted to Florida's WCIP, and NCCI assigned Liberty to serve as Plaintiffs' insurance or servicing carrier commencing in 1989. Subsequently, in March of 1992, Plaintiffs joined a self-insurance group and terminated its coverage from Liberty. In October of 1992, Plaintiffs filed their Complaint against Defendants, alleging in Counts I and II that Defendants violated federal and state antitrust statutes. Liberty then filed a counterclaim alleging that Plaintiffs owed approximately one million dollars in unpaid premiums for insurance coverage.

The Magistrate Judge, in his Report and Recommendation, first addressed Plaintiffs' argument that the federal preemption doctrine prohibits the State of Florida from regulating the conduct of insurance carriers in connection with LHWCA coverage, including the setting of insurance rates. After a review of the applicable law, the Magistrate Judge concluded that "contrary to plaintiffs' assertions, the Constitution does not completely bar

States from enacting legislation covering all subjects which relate to admiralty or to maritime jurisdiction." Plaintiffs assert that despite this conclusion, the Constitution does bar state legislation, supervision and regulation of areas covered by the LHWCA. It is clear from a review of the Magistrate's discussion of federal preemption that the Magistrate Judge has concluded that the Constitution does not bar state legislation, supervision and regulation of areas covered by the LHWCA. The Court agrees with this finding for the reasons set forth in the Magistrate Judge's Report.

Plaintiffs also object to the Magistrate Judge's conclusion that the LHWCA is a comprehensive statute with regard to rights and remedies. Plaintiffs assert that the Magistrate Judge has interpreted the LHWCA too narrowly and that regulation covers a broad range of subjects. Although the LHWCA covers topics beyond rights and remedies, this coverage is not so extensive as to preempt the entire filed or to prevent regulation of the relationship between the insurance carrier and the employer. *See Gade v. National Solid Wastes Management Assn.*, ___ U.S. ___, 112 S.Ct. 1374 (1992); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). Plaintiffs further asserts that the Magistrate Judge has incorrectly applied the physical impossibility test for conflict preemption, and should have instead evaluated whether Florida's WCIP stands as an obstacle to the accomplishment of purposes and objectives of Congress. *See Gade*, 348 U.S. 310. An examination of the Magistrate Judge's Report reveals that he did consider these factors, and concluded that Florida's regulation of risk ratings would not affect the uniformity of federal law or impede the

goals of the federal regulation through the LHWCA. The Court agrees with this finding. Although the LHWCA establishes remedies available to maritime workers and, through regulatory provisions, sets forth certain qualifications for insurers, it does not cover the business of insurance, which is regulated by the state.[1] *See Wilburn*, 348 U.S. 310. State regulation of activities of insurance carriers does not impede the goal of the LHWCA to provide workers' compensation benefits to maritime workers.

Plaintiffs make several objections to that portion of the Magistrate Judge's Report which finds that the state action doctrine immunizes Defendants' activities. Plaintiffs first contend that the Magistrate Judge only considered Defendants' collusive rate-making activities and failed to consider activities such as the collusive designation of employers as assigned risks and the collusive determination of premiums. A review of the submissions of the parties indicates that the State of Florida not only exercises extensive supervision over Defendants' rate-making activities, but also actively supervises those activities related to rate-making. For example, Florida's Department of Insurance expressly approved the AARP which governed premium calculations for the insurance policy provided to Plaintiffs. The fact that insurers may

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[1] Additionally, as noted by the Magistrate Judge, the McCarran-Ferguson Act of 1947, 15 U.S.C. §1012, creates a strong presumption against a finding of federal preemption of insurance regulation. Section 1012 provides, "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance."

establish rates in the first instance does not negate a finding that the state actively supervises rate-making, as such rates do not become effective absent state approval. *See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991); Fla. Stat. §627.101 (requiring DOI review of workers' compensation insurance rate filings to determine if they meet the applicable requirements of Chapter 627); Fla. Stat. §627.111(2) ("if the order of the department disapproves the [rate] filing, the filing shall not become effective during the effectiveness of such order). Based on the foregoing, Defendants have established the active state supervision required for application of the State action immunity doctrine. *See F.T.C. v. Ticor Title Ins. Co.*, ___ U.S. ___, 112 S.Ct. 2169 (1992); *Midcal*, 445 U.S. 97; *Parker v. Brown*, 317 U.S. 341 (1943).

Secondly, Plaintiffs argue that the Magistrate Judge failed to properly balance Florida's articulated policy of "encourag[ing] independent action by, and reasonable price competition among insurers," with the articulated policy of "author[ing] cooperation between insurers in rate making and other related matters." Fla. Stat. §627.031. However, it appears from a review of the remainder of Chapter 627 that the Florida Legislature intended to displace market competition among insurers. Section 627.031 provides:

> (1) The purposes of this part are:
>
> (a) To promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate, or unfairly discriminatory.

Additional provisions of Chapter 627 set forth the extensive requirements which workers' compensation insurers must fulfill in determining and fixing rates. *See e.g.* Fla. Stat. §627.072. A review of this comprehensive legislative scheme leads the Court to conclude that Florida has clearly articulated a policy of displacing business freedom in rate-making, the assignment of risk, and related workers' compensation matters. *See Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985); *Executive Town & County Services, Inc. v. City of Atlanta*, 798 F.2d 1529 (11th Cir. 1986). Accordingly, Defendants' actions merit the protection of the state action immunity doctrine.

Upon consideration of the foregoing, it is hereby ORDERED and ADJUDGED that:

1. Plaintiffs' Motion for Partial Summary Judgment (or For A Preliminary Legal Determination) Regarding Federal Preemption (Dkt. #21) is DENIED.

2. Defendants' Motion for Summary Judgment Dismissing Plaintiffs' Antitrust Claims Based on the State Action Immunity Doctrine (Dkt. #34) is GRANTED.

3. Defendant NCCI's Motion to Strike Memorandum in Support of Plaintiffs' Objections to the Report and Recommendations of the Magistrate Regarding Federal Preemption in State Action (Dkt #65) is DENIED.

DONE AND ORDERED, at Tampa, Florida, this 13th day of January, 1994.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES
DISTRICT JUDGE

Copies to: Counsel of record

CODE OF FEDERAL REGULATIONS

TITLE 20 – EMPLOYEES' BENEFITS

CHAPTER VI – EMPLOYMENT STANDARDS ADMINISTRATION, DEPARTMENT OF LABOR

SUBCHAPTER A – LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND RELATED STATUTES

PART 703 – INSURANCE REGULATIONS

§703.001 Scope of part.

This Part 703 contains the regulations of the OWCP governing the authorization of insurance carriers, the authorization of self-insurers, and the issuance of certificates of compliance. Such provisions are required by the LHWCA, but in almost every instance apply, and hereby are applied, to the extensions of the LHWCA. In those few instances where a separate provision is required, tailored to meet the specific requirements of one of the extended acts, such separate provisions are placed in the succeeding parts of this subchapter.

§703.002 Forms.

Any information required by the regulations in this part to be submitted to the OWCP shall be submitted on such forms as the Director may deem appropriate and may authorize from time to time for such purpose.

§703.003 Failure to secure coverage; penalties.

(a) Each employer is required to secure coverage under this Act either through an authorized insurance

carrier or by becoming an authorized self-insurer. An employer who fails to secure coverage by either manner described in Section 32(a)(1) or (2) of the Act, 33 U.S.C. 932(a), is subject, upon conviction, to a fine of not more than $10,000, or by imprisonment for not more than one year, or both.

(1) Where the employer is a corporation: the president, secretary and treasurer each will also be subject to this fine and/or imprisonment, in addition to the fine against the corporation and each is personally liable, jointly with the corporation, for all compensation or other benefits payable under the Act during the time failure to secure coverage continues.

(b) Any employer who willingly and knowingly transfers, sells, encumbers, assigns or in any manner disposes of, conceals, secretes, or destroys any property belonging to the employer after an employee sustains an injury covered by this Act, with the intention to avoid payment to that employee or his/her dependents of compensation under this Act shall be guilty of a misdemeanor and punished upon conviction by a fine of not more than $10,000 and/or imprisonment for one year.

(1) Where the employer is a corporation: the president, secretary and treasurer are also each liable to imprisonment and, along with the corporation, jointly liable for the fine.

§703.101 Types of companies which may be authorized by the OWCP.

The OWCP will consider for the granting of authority to write insurance under the Longshoremen's and Harbor Workers' Compensation Act and its extensions the application of any stock company, mutual company or association, or any other person or fund, while authorized under the laws of the United States or for any State to insure workmen's compensation. The term "carrier" as used in this Part means any person or fund duly authorized to insure workmen's compensation benefits under said Act, or its extensions.

§703.102 Applications for authority to write insurance; how filed; evidence to be submitted; other requirements.

An application for authority to write insurance under this Act shall be made in writing, signed by an officer of the applicant duly authorized to make such application, and transmitted to the Office of Workmen's Compensation Programs, U.S. Department of Labor, Washington, D.C. 20210. Such application shall be accompanied by full and complete information regarding the history and experience of such applicant in the writing of workmen's compensation insurance, together with evidence that it has authority in its charter or form of organization to write such insurance, and evidence that the applicant is currently authorized to insure workmen's compensation liability under the laws of the United States or of any State. The statements of fact in each application and in the supporting evidence shall be verified by the oath of the officer of the applicant who signs such application.

Each applicant shall state in its application the area or areas, in which it intends to do business. In connection with any such application the following shall be submitted, the Office reserving the right to call for such additional information as it may deem necessary in any particular case:

(a) A copy of the last annual report made by the applicant to the insurance department or other authority of the State in which it is incorporated, or the State in which its principal business is done.

(b) A certified copy from the proper State authorities of the paper purporting to show the action taken upon such report, or such other evidence as the applicant desires to submit in respect of such report, which may obviate delay caused by an inquiry of the OWCP of the State authorities relative to the standing and responsibility of the applicant.

(c) A full and complete statement of its financial condition, if not otherwise shown, and, if a stock company, shall show specifically its capital stock and surplus.

(d) A copy of its charter or other formal outline of its organization, its rules, its bylaws, and other documents, writings, or agreements by and under which it does business, and such other evidence as it may deem proper to make a full exposition of its affairs and financial condition.

§703.103 Stock companies holding Treasury certificates of authority.

A stock company furnishing evidence that it is authorized to write workmen's compensation insurance under the laws of the United States or of any State, which holds a certificate of authority from the Secretary of the Treasury as an acceptable surety on Federal bonds, unless requested to do so, need not transmit to the Office with its application copies of such financial reports as are on file in the Department of the Treasury. The acceptance by that Department of such a company will be considered by the Office in conjunction with the application of such company, provided there has been compliance with the other requirements of the regulations in this Part.

§703.104 Applicants currently authorized to write insurance under the extensions of the LHWCA.

Any applicant currently authorized by the Office to write insurance under any extension of the LHWCA need not support its application under the LHWCA or any other LHWCA extension with the evidence required by the regulations in this part, except the form of policy and endorsement which it proposes to use, unless specifically requested by the Office, but instead its application may refer to the fact that it has been so authorized.

§703.105 Copies of forms of policies to be submitted with application.

With each application for authority to write insurance there shall be submitted for the approval of the

Office copies of the forms of policies which the applicant proposes to issue in writing insurance under the LHWCA, or its extensions, to which shall be attached the appropriate endorsement to be used in connection therewith.

§703.106 Certificate of authority to write insurance.

No corporation, company, association, person, or fund shall write insurance under this Act without first having received from the OWCP a certificate of authority to write such insurance. Any such certificate issued by the Office, after application therefor in accordance with these regulations, may authorize the applicant to write such insurance in a limited territory as determined by the Office. Any such certificate may be suspended or revoked by the Office prior to its expiration for good cause shown, but no suspension or revocation shall affect the liability of any carrier already incurred. Good cause shall include, without limitation, the failure to maintain in such limited territory a regular business office with full authority to act on all matters falling within the Act, and the failure to promptly and properly perform the carrier's responsibilities under the Act and these regulations, with special emphasis upon lack of promptness in making payments when due, upon failure to furnish appropriate medical care, and upon attempts to offer to, or urge upon, claimants inequitable settlements. A hearing may be requested by the aggrieved party and shall be held before the Director or his representative prior to the taking of any adverse action under this section.

§703.107 [Reserved]

§703.108 Period of authority to write insurance.

Effective with the end of the authorization period July 1, 1983, through June 30, 1984, annual reauthorization of authority to write insurance coverage under the Act is no longer necessary. Beginning July 1, 1984, and thereafter, newly issued Certificates of Authority will show no expiration date. Certificates of Authority will remain in force for so long as the carrier complies with the requirements of the OWCP.

§703.109 Longshoremen's endorsement; see succeeding parts for endorsements for extensions.

(a) The following form of endorsement application to the standard workmen's compensation and employer's liability policy, shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No. ___,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all the provisions of this Act, and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, U.S. Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Act.

This endorsement shall not be cancelled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the District Director and to this employer.

All terms, conditions, requirements, and obligations, expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

§703.110 Other forms of endorsements and policies.

Where the form of endorsement prescribed by §703.109 is not appropriate when used in conjunction with a form of policy approved for use by the Office no modification thereof shall be used unless specifically approved by the Office. Where the form of policy is designed to include therein the obligations of the insurer under said Act without the use of the appropriate endorsements, the policy shall contain the provisions required to be included in any of the endorsements. Such a policy, however, shall not be used until expressly approved by the Office.

§703.111 Submission of new forms of policies for approval; other endorsements.

No new forms of policies or modification of existing forms of policies shall be used by an insurer authorized by the Office under the regulations in this Part to write insurance under said Act except after submission to and approval by the Office. No endorsement altering any provisions of a policy approved by the Office shall be used except after submission to and approval by the Office.

§703.112 Terms of policies.

A policy or contract of insurance shall be issued for the term of not less than 1 year from the date that it becomes effective, but if such insurance be not needed except for a particular contract or operation, the term of the policy may be limited to the period of such contract or operation.

§703.113 Marine insurance contracts.

A longshoremen's policy, or the longshoremen's endorsement provided for by §703.109 for attachment to a marine policy, may specify the particular vessel or vessels in respect of which the policy applies and the address of the employer at the home port thereof. The report of the issuance of a policy or endorsement required by §703.116 to be made by the carrier shall be made to the district director for the compensation district in which the home port of such vessel or vessels is located, and such report

shall show the name and address of the owner as well as the name or names of such vessel or vessels.

§703.114 Notice of cancellation.

Cancellation of a contract or policy of insurance issued under authority of said Act shall not become effective otherwise than as provided by 33 U.S.C. 936(b); and notice of a proposed cancellation shall be given to the deputy commissioner and to the employer in accordance with the provisions of 33 U.S.C. 912(c), 30 days before such cancellation is intended to be effective.

§703.115 Discharge by the carrier of obligations and duties of employer.

Every obligation and duty in respect of payment of compensation, the providing of medical and other treatment and care, the payment or furnishing of any other benefit required by said Act and in respect of the carrying out of the administrative procedure required or imposed by said Act or the regulations in this part upon an employer shall be discharged and carried out by the carrier except that the prescribed report of injury or death shall be sent by the employer to the district director and to the insurance carrier as required by 33 U.S.C. 930. Such carrier shall be jointly responsible with the employer for the submission of all reports, notices, forms, and other administrative papers required by the district director or the Office in the administration of said Act to be submitted by the employer, but any form or paper so submitted where required therein shall contain in addition to the name and address of the carrier, the full name and

address of the employer on whose behalf it is submitted. Notice to or knowledge of an employer of the occurrence of the injury or death shall be notice to or knowledge of such carrier. Jurisdiction of the employer by a district director, the Office, or appropriate appellate authority under said Act shall be jurisdiction of such carrier. Any requirement under any compensation order, finding, or decision shall be binding upon such carrier in the same manner and to the same extent as upon the employer.

§703.116 Report by carrier of issuance of policy or endorsement.

Each carrier shall report to the district director assigned to a compensation district each policy and endorsement issued by it to an employer who carries on operations in such compensation district. The report shall be made in such manner and on such form as the district or the Office may require.

§703.117 Report; by whom sent.

The report of issuance of a policy and endorsement provided for in §703.116 shall be sent by the home office of the carrier, except that any carrier may authorize its agency or agencies in any compensation district to make such reports to the district director, provided the carrier shall notify the district director in such district of the agencies so duly authorized.

§703.118 Agreement to be bound by report.

Every applicant for authority to write insurance under the provisions of this Act, shall be deemed to have included in its application an agreement that the acceptance by the district director of a report of the issuance of a policy of insurance, as provided for by §703.116, shall bind the carrier to full liability for the obligations under this Act of the employer named in said report, and every certificate of authority to write insurance under this Act shall be deemed to have been issued by the Office upon consideration of the carrier's agreement to become so bound. It shall be no defense to this agreement that the carrier failed or delayed to issue the policy to the employer covered by this report.

§703.119 Report by employer operating temporarily in another compensation district.

Where an employer having operations in one compensation district contemplates engaging in work subject to the Act in another compensation district, his carrier may submit to the district director of such latter district a report pursuant to §703.116 containing the address of the employer in the first mentioned district with the additional notation "No present address in ___ compensation district. Certificate requested when address given."

§703.120 Name of one employer only shall be given in each report.

A separate report of the issuance of a policy and endorsement, provided for by §703.116, shall be made for

each employer covered by a policy. If a policy is issued insuring more than one employer, a separate report for each employer so covered shall be sent to the district director concerned, with the name of only one employer on each such report.

§703.121 Multiple policies covering the same employer in the same compensation district prohibited; action upon receipt of a second report.

An employer operating within any compensation district shall have such operations in that district insured by not more than one insurance carrier. Accordingly, where a report provided for by §703.116 is received, and where reports on file show that a named employer is insured by another insurance carrier under a policy with an unexpired term, the district director shall inform the employer of the pre-existing coverage and of the OWCP's prohibition against multiple policies.

§703.301 Employers who may be authorized as self-insurers.

The Office will consider for the granting of authority to secure by self-insurance the payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act, or its extensions, any employer who, pursuant to the regulations in this part, furnishes to the Office satisfactory proof of such employer's ability to pay compensation directly, and who agrees to immediately cancel any existing policy as of the time of the OWCP's approval of the employer to be self-insured, or who does

not become otherwise insured under this Act. The succeeding regulations relating to self-insurers require the deposit of security in the form either of an indemnity bond or negotiable securities (at the option of the employer) of a kind and in an amount determined by the Office, and prescribe the conditions under which such deposit shall be made. The term "self-insurer" as used in these regulations means any employer securing compensation in accordance with the provisions of 33 U.S.C. 932(a)(2) and with these regulations.

§703.302 Application for authority to become a self-insurer; how filed; information to be submitted; other requirements.

Application for authority to become a self-insurer may be made by any employer desiring such privilege and shall be addressed to the OWCP and be made on a form provided by the Office. Such application shall contain:

(a) A statement of the employer's payroll report for the preceding 12 months; (b) a statement of the average number of employees engaged in employment within the purview of the LHWCA or any of its extensions for the preceding 12 months; (c) a statement of the number of injuries to such employees resulting in disability of more than 7 days' duration, or in death, during each of 3 years next preceding the date of the application; (d) a certified financial report for each of the three years preceding the application; (e) a description of the facilities maintained or the arrangements made for the medical and hospital care of injured employees; and (f) a statement describing

the provisions and maximum amount of any excess or catastrophic insurance. The Office may in its discretion require the applicant to submit such further information or such evidence as the Office may deem necessary to have in order to enable it to give adequate consideration to such application. Such application shall be signed by the applicant over his typewritten name and if the applicant is not an individual, by an officer of the applicant duly authorized to make such application over his typewritten name and official designation and shall be sworn to by him. If the applicant is a corporation, the corporate seal shall be affixed. The application shall be filed with the OWCP national office in Washington, D.C. The regulations in this part shall be binding upon each applicant hereunder and the applicant's consent to be bound by all requirements of the said regulations shall be deemed to be included in and a part of the application, as fully as though written therein.

§703.303 Decision upon application of employer; deposit of negotiable securities or indemnity bond.

The decision of the Office to grant an application of an employer for authority to pay compensation under said Act as a self-insurer will be transmitted to the applicant on a form prescribed by the Office. Such grant shall be conditioned upon a deposit of security in the form of an indemnity bond or of negotiable securities in an amount fixed by the Office, and the execution and filing of an agreement and undertaking in the form prescribed by the Office, as required by §703.304.

§703.304 Filing of agreement and undertaking.

The applicant for the privilege of self-insurance shall as a condition subsequent to receiving authorization to act as a self-insurer, execute and file with the Office an agreement and undertaking in a form prescribed and provided by the Office in which the applicant shall agree: (a) To pay when due, as required by the provisions of said Act, all compensation payable on account of injury or death of any of its employees injured within the purview of said Act; (b) in such cases to furnish medical, surgical, hospital, and other attendance, treatment and care as required by the provisions of said Act; (c) to deposit with the Office an indemnity bond in the amount which the Office shall fix, or to deposit negotiable securities as provided for by the regulations in this part in the amount which the Office shall fix, accordingly as elected in the application; (d) to authorize the Office to sell such negotiable securities so deposited or any part thereof and from the proceeds thereof to pay such compensation, medical, and other expenses and any accrued penalties imposed by law as it may find to be due and payable; and (e) to obtain and maintain, if required by the Office, excess or catastrophic insurance, in amounts to be determined by the Office.

§703.305 Decision upon application of employer; furnishing of indemnity bond or deposit of negotiable securities required.

The applicant for the privilege of self-insurance, as a condition subsequent to receiving authorization to act as

self-insurer, shall give security for the payment of compensation and the discharge of all other obligations under the said Act, in the amount fixed by the Office, which may be in the form of an indemnity bond with sureties satisfactory to the Office, or of a deposit of negotiable securities as provided in the regulations in this part. The amount of such security so to be fixed and required by the Office shall be such as the Office shall deem to be necessary and sufficient to secure the performance by the applicant of all obligations imposed upon him as an employer by the Act. In fixing the amount of such security the Office will take into account the financial standing of the employer, the nature of the work in which he is engaged, the hazard of the work in which the employees are employed, the payroll exposure, and the accident experience as shown in the application and the Office's records, and any other facts which the Office may deem pertinent. Additional security may be required at any time in the discretion of the Office. The indemnity bond which is required by these regulations shall be in such form, and shall contain such provisions, as the Office may prescribe: Provided, That only surety companies approved by the United States Treasury Department under the laws of the United States and the rules and regulations governing bonding companies may act as sureties on such indemnity bonds.

§703.306 Kinds of negotiable securities which may be deposited; conditions of deposit; acceptance of deposits.

An applicant for the privilege of self-insurance electing to deposit negotiable securities to secure his obligations under said Act in the amount fixed by the Office

under the regulations in this part shall deposit any negotiable securities acceptable as security for the deposit of public monies of the United States under regulations issued by the Secretary of the Treasury. The approval, valuation, acceptance, and custody of such securities is hereby committed to the several Federal Reserve Banks and the Treasurer of the United States when authorized under the regulations in this part to receive deposits of such securities.

§703.307 Deposits of negotiable securities with Federal Reserve banks or the Treasurer of the United States; authority to sell such securities; interest thereon.

Deposits of securities provided for by the regulations in this part shall be made with any Federal Reserve bank or any branch of a Federal Reserve bank designated by the Office, or the Treasurer of the United States, and shall be held subject to the order of the Office with power in the Office, in its discretion in the event of default by the said self-insurer, to collect the interest and the principal as they may become due, to sell the securities or any of them as may be required to discharge the obligations of the self-insurer under said Act and to apply the proceeds to the payment of any compensation or medical expense for which the self-insurer may be liable. The Office may, however, whenever it deems it unnecessary to resort to such securities for the payment of compensation, authorize the self-insurer to collect interest on the securities deposited by him.

§703.308 Substitution and withdrawal of negotiable securities.

No substitution or withdrawal of negotiable securities deposited by a self-insurer shall be made except upon authorization by the Office. A self-insurer discontinuing business, or discontinuing operations within the purview of said Act, or providing security for the payment of compensation by insurance under the provisions of said Act may apply to the Office for the withdrawal of securities deposited under the regulations in this part. With such application shall be filed a sworn statement setting forth:

(a) A list of all outstanding cases in each compensation district in which compensation is being paid, with the names of the employees and other beneficiaries, giving a description of causes of injury or death, and a statement of the amount of compensation paid; (b) a similar list of all pending cases in which no compensation has as yet been paid; and (c) a similar list of all cases in which injury or death has occurred within 1 year prior to such application or in which the last payment of compensation was made within 1 year prior to such application. In such cases withdrawals may be authorized by the Office of such securities as in the opinion of the Office may not be necessary to provide adequate security for the payment of outstanding and potential liabilities of such self-insurer under said Act.

§703.309 Increase or reduction in the amount of indemnity bond or negotiable securities.

Whenever in the opinion of the Office the principal sum of the indemnity bond filed or the amount of negotiable securities deposited by a self-insurer is insufficient to afford adequate security for the payment of compensation and medical expenses under said Act, the self-insurer shall, upon demand by the Office, file such additional indemnity bond or deposit under the regulations in this part such additional amount of negotiable securities as the Office may require. At any time upon application of a self-insurer, or on the initiative of the Office, when in its opinion the facts warrant, the principal sum of an indemnity bond required to be given or the amount of negotiable securities required to be deposited may be reduced. A self-insurer seeking such reduction shall furnish such information as the Office may request relative to his current affairs, the nature and hazard of the work of his employees, the amount of the payroll of his employees engaged in maritime employment within the purview of the said Act, his financial condition, his accident experience, and such other evidence as may be deemed material, including a record of payments of compensation made by him.

§703.310 Reports required of self-insurers; examination of accounts of self-insurer.

At such times as the Office may require or prescribe, each self-insurer shall submit such of the following reports as may be requested:

(a) A certified financial statement of the self-insurer's assets and liabilities, or a balance sheet.

(b) A sworn statement showing by classifications the payroll of employees of the self-insurer who are engaged in employment within the purview of the LHWCA or any of its extensions.

(c) A sworn statement covering the 6 months' period preceding the date of such report, listing by compensation districts all death and injury cases which have occurred during such period, together with a report of the status of all outstanding claims, showing the particulars of each case.

Whenever it deems it to be necessary, the Office may inspect or examine the books of account, records, and other papers of a self-insurer for the purpose of verifying any financial statement submitted to the Office by self-insurer or verifying any information furnished to the Office in any report required by this section, or any other section of the regulations in this Part, and such self-insurer shall permit the Office or its duly authorized representative to make such an inspection or examination as the Office shall require. In lieu of this requirement the Office may in its discretion accept an adequate report of a certified public accountant.

§703.311 Period of authorization as self-insurer.

(a) Effective with the end of the authorization period July 1, 1983, through June 30, 1984, annual reauthorization of the self-insurance privilege is no longer necessary. Beginning July 1, 1984, and thereafter, newly

approved and renewed self-insurance authorizations will remain in effect for so long as the self-insurer complies with the requirements of the OWCP.

(b) A self-insurer who currently has on file an indemnity bond, will receive from the office, on or about May 10 of each year, a bond form for execution in contemplation of the continuance of the self-insurance authorization, and the submission of such bond duly executed in the amount indicated by the office will be deemed and treated as a condition of the continuing authorization.

§703.312 Revocation of privilege of self-insurance.

The Office may for good cause shown suspend or revoke the authorization of any self-insurer. Failure by a self-insurer to comply with any provision or requirement of law or of the regulations in this part, or with any lawful order or communication of the Office, or the failure or insolvency of the surety on his indemnity bond, or impairment of financial responsibility of such self-insurer, shall be deemed good cause for such suspension or revocation.

* * *

§703.501 Issuance of certificates of compliance.

Every employer who has secured the payment of compensation as required by 33 U.S.C. 932 and by the regulations in this part may request a certificate from the district director in the compensation district in which he has operations, and for which a certificate is required by 33 U.S.C. 937, showing that such employer has secured

the payment of compensation. Only one such certificate will be issued to an employer in a compensation district, and it will be valid only during the period for which such employer has secured such payment. An employer so desiring may have photocopies of such a certificate made for use in different places within the compensation district. Two forms of such certificates have been provided by the Office, one form for use where the employer has obtained insurance generally under these regulations, and one for use where the employer has been authorized as a self-insurer.

§703.502 Same; employer operating temporarily in another compensation district.

A district director receiving a report of the issuance of a policy of insurance with the notation authorized by §703.119, will file such report until he receives from the insured employer named therein a request for certificate of compliance, giving the address of the employer within the compensation district of such deputy commissioner. Upon receipt of such a request the district director will send the proper certificate of compliance to such employer at such address.

§703.503 Return of certificates of compliance.

Upon the termination by expiration, cancellation or otherwise, of a policy of insurance issued under the provisions of law and these regulations, or the revocation or termination of the privilege of self-insurance granted by the Office, all certificates of compliance issued on the basis of such insurance or self-insurance shall be void

and shall be returned by the employer to the district director issuing them with a statement of the reason for such return. An employer holding certificate of compliance under an insurance policy which has expired, pending renewal of such insurance need not return such certificate of compliance if such expired insurance is promptly replaced. An employer who has secured renewal of insurance upon the expiration of policy under said Act or whose self-insurance thereunder is reauthorized without a break in the continuity thereof need not return an expired certificate of compliance.

FLORIDA STATUTES

§627.031 Purposes of this part; interpretation. –

(1) The Purposes of this part are:

(a) To promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate, or unfairly discriminatory;

(b) To encourage independent action by, and reasonable price competition among, insurers;

(c) To authorize the existence and operation of qualified rating organizations and advisory organizations and to require that specified rating services of such rating organizations be generally available to all authorized insurers; and

(d) To authorize cooperation between insurers in ratemaking and other related matters.

(2) It is the purpose of this part to protect policyholders and the public against the adverse effects of excessive, inadequate, or unfairly discriminatory insurance rates and to authorize the department to regulate such rates. If at any time the department has reason to believe any such rate is excessive, inadequate, or unfairly discriminatory under the law, it is directed to take the necessary action to cause such rate to comply with the laws of this state.

§627.311 Joint underwriters and joint reinsurers. –

(1) Every group, association, or other organization of insurers which engages in joint underwritings or joint reinsurance shall be subject to regulation with respect thereto as herein provided, subject, however,

with respect to joint underwriting, to all other provisions of this chapter and, with respect to joint reinsurance, to §§624.15 and 624.3161.

(2) If the department finds that any activity or practice of any such group, association, or other organization is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, if may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, and requiring the discontinuance of such activity or practice.

(3) . . . .

(4) (a) The department may, after consultation with insurers licensed to write workers' compensation and employer's liability insurances in this state, approve a joint underwriting plan for the purpose of equitable apportionment or sharing of workers' compensation and employer's liability insurances among insurers. The plan shall operate subject to the supervision of a board of governors, to be named by the Insurance Commissioner, the members of which shall serve for terms of 2 years, consisting of three insurers participating in the plan, three employers, and one producing agent for the plan. The minutes, audits, and procedures of the board of governors shall be subject to chapter 119. The plan of operation of the joint underwriting plan shall be prepared by the board of governors and shall be subject to approval by the Insurance Commissioner. In addition, the Insurance Commissioner shall review the plan of operation on an ongoing basis. The plan shall be subject to revision at the request of the Insurance Commissioner at any time. The board of governors shall designate one or more servicing carriers for the plan from the ranks of those insurers participating in

the plan. Any such designation shall be subject to the approval of the Insurance Commissioner, and any such designation may be rescinded for cause by the board subject to the approval of the Insurance Commissioner or by the Insurance Commissioner if deemed appropriate in the exercise of his judgment. The plan shall take such actions as will, in the judgment of the board, encourage safety among its insureds. . . . . Designated servicing carriers shall provide policy and claims service on behalf of all other insurers participating in the plan in order to provide workers' compensation and employer's liability insurances for applicants who are in good faith entitled to but who are unable to purchase workers' compensation and employer's liability insurances through the voluntary insurance market at standard rates. Such plan shall provide that the designated insurers shall issue policies of insurance and provide policyholder and claims service on behalf of all insurers for the Joint Underwriting Association. The plan shall provide for the equitable apportionment among insurers of losses and expenses incurred. . . . If the plan is adopted, all insurers authorized to write workers' compensation and employer's liability insurances in this state shall subscribe thereto and participate therein. The plan shall be operated as a nonprofit venture. The plan shall be divided into two subplans as follows:

1. Subplan "A" shall provide coverage for insureds who have a demonstrated accident frequency problem, who have a measurably adverse loss ratio over a period of years, or who have demonstrated an attitude of non-compliance with safety requirements.

2. Subplan "B" shall provide coverage for all other insureds of the joint underwriting plan.

The methodology of applying these criteria, which shall be used to determine into which subplan an insured shall be placed, shall be determined by the Insurance Commissioner, and such methodology shall be applied regardless of the number of employees or the amount of payroll of the insured. The board of governors shall establish a system of surcharges applicable to insureds covered under subplan A, subject to approval by the Insurance Commissioner. A system of surcharges applicable to insured covered by subplan B shall not be established. Retrospective evaluation of premiums and loss and expense experience of insureds within either subplan, as well as retrospective evaluation of premiums, losses, and expense experience of each subplan, shall be performed by the board of governors according to the methodology submitted by the board to, and approved by, the Insurance Commissioner. . . .

(b) . . . .

(c) . . . .

§627.314 Concerted action by two or more insurers. –

(1) Subject to and in compliance with the provisions of this part authorizing insurers to be members or subscribers of rating or advisory organizations or to engage in joint underwriting or joint reinsurance, two or more insurers may act in concert with each other and with others with respect to any matters pertaining to:

(a) The making of rates or rating systems . . . ;

(b) The preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections, and investigations;

(c) The furnishing of loss or expense statistics or other information or data; or

(d) The carrying on of research.

(2) . . . . [Agreements among companies with common ownership]

(3) (a) . . . .

(b) . . . .

(c) This subsection does not apply as to workers' compensation and employer's liability insurances.

(4) . . . .

(5) . . . .

(6) . . . .